



## STATEMENT OF THE CASE

Defendant-Appellant Jeffery Jerome Scott entered a guilty plea to murder pursuant to a plea agreement. About a month later, Scott moved to withdraw his guilty plea. The motion was denied and he was subsequently sentenced to 55 years executed. Scott now appeals from the denial of his motion to withdraw his guilty plea and his sentence.

We affirm.

## ISSUES

Scott states the issues as:

1. Whether defendant's guilty plea should have been set aside.
2. Whether the trial court erred in sentencing defendant.

## FACTS

The plea agreement, insofar as pertinent to his appeal, capped Scott's sentence at not exceeding 55 years and provided that he could file a petition for modification and/or reduction of the sentence. Scott entered his guilty plea on 8 February 2006. On 1 March 2006, Scott filed his motion to withdraw his guilty plea based upon the case of *Edwards v. State*, 842 N.E.2d 849 (Ind. Ct. App. 2006) which was handed down on 21 February 2006. The motion to withdraw his guilty plea was denied, and he was sentenced to 55 years executed.

## DISCUSSION AND DECISION

### 1. The Guilty Plea

At the guilty plea hearing, Scott was asked by the State if he knowingly and intentionally took the life of his victim. Scott answered that he did. Later at the hearing

on his motion to withdraw his guilty plea, Scott testified that he did not knowingly and intentionally take the life of his victim. Scott had a change of heart. In his argument to the trial court, Scott's counsel referred to the *Edwards* case and argued that it compromised Scott's ability to appeal pursuant to Ind. Appellate Rule 7(B).

In his motion to withdraw his guilty plea, Scott cites the *Edwards* case for the proposition that a defendant with a "capped" plea reserves the right to appeal the appropriateness of the trial court's identification of mitigating and aggravating factors in sentencing under the cap; however, the defendant is precluded from challenging the appropriateness of the sentence under App.R. 7(B).

Scott's question is answered in *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006), where the supreme court held that even where a plea agreement sets forth a sentencing cap or a sentencing range, the trial court must still exercise discretion in determining the sentence it will impose and as a consequence on appeal the defendant is entitled to contest the merits of the trial court's sentencing discretion as described in Ind. Appellate Rule 7(B). *Id.* at 1078.

It is difficult to determine what harm has occurred to Scott. The trial court in denying his motion to withdraw his guilty plea, held that his testimony at that hearing fell short of establishing a manifest injustice as required by Ind. Code 35-35-1-4. Moreover, the plea agreement provides for a petition to modify or reduce the sentence. It occurs that is what Scott has done in the next issue.

## 2 The Sentence

Scott was sentenced to the advisory sentence of 55 years on the murder charge. Ind. Code 35-50-2-3(a). He now argues that the trial court failed to identify the proper mitigators (remorse and guilty plea) or weigh them appropriately.

With respect to mitigating factors, it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. *Id.* Although the court must consider evidence of mitigating factors presented by the defendant, it is neither required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently mitigating. *Id.* Additionally, the court is not compelled to credit mitigating factors in the same manner as would the defendant. *Id.* An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

We find that the trial court did not err in disregarding Scott's claim of remorse. The court was not required to find Scott to be remorseful or, if it did, sufficiently remorseful to warrant mitigating the sentence. Substantial deference must be given to a trial court's evaluation of remorse. *Corrales v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the

remorse is genuine. *Id.* The trial court's sentencing order concluded that Scott had no genuine remorse for killing his victim.

Generally, a defendant who pleads guilty deserves to have some mitigating weight extended to a guilty plea in return. *Robbins v. State*, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005). But where the defendant reaps a substantial benefit by pleading guilty, the trial court does not abuse its discretion in refusing to consider the guilty plea to be a significant mitigating factor. *Id.* The trial court's sentencing order in this case held that Scott's sentence was capped at 55 years and that several other serious charges were dismissed. The State further agreed not to pursue a motion to revoke probation. Scott reaped a substantial benefit from his guilty plea. Accordingly, there was no abuse of discretion.

Additionally, a trial court is not required to list aggravating or mitigating factors when it imposes the statutory advisory sentence. *Childress*, 848 N.E.2d\_ at 1080. The sentencing order, which mentions mitigating and aggravating factors in the determination of Scott's sentence, may be treated as surplusage.

It also is worth noting that Scott made an unsworn statement at the sentencing hearing that in the main was his contention of ineffective assistance of trial counsel. We do not read anything in that unsworn statement that supports the existence of mitigating circumstances. It is well established that we may not consider evidence or arguments not properly presented in the trial court. *Gonser v. State*, 843 N.E.2d 947, 951 (Ind. Ct. App. 2006).

### CONCLUSION

The trial court did not err in its ruling on Scott's motion to withdraw his guilty plea. Furthermore, the trial court properly sentenced Scott.

Judgment affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.